85-1853

No. _____

Supreme Court, U.S.
FILED
MAY 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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HOLD

QUESTION PRESENTED

Whether a jury finding a felony-murder special circumstance without a finding on intent to kill required reversal by the California Supreme Court under the rule espoused in Connecticut v. Johnson (1983) 460 U.S. 73 when the special circumstance finding cannot be deemed a guilt or innocence determination in light of Cabana v. Bullock (1986) 474 U.S. ___, [88 L.Ed.2d 704].

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of California, requests this Court to issue a writ of certiorari to review the judgment and opinion of the California Supreme Court dated December 31, 1985, affirming respondent's conviction but setting aside the special circumstances and the death penalty. A petition for

rehearing was denied on March 13, 1986, and remittitur issued on that date.

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the death penalty (People v. Hamilton (1985) 41 Cal.3d 408.) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing appears as Appendix B.

JURISDICTION

The judgment of the California Supreme Court was filed on December 31, 1985. A timely petition for rehearing was denied on March 13, 1986. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C., section 1257 (3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Eight and Fourteen.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County on July 11, 1979, respondent was charged in four felony counts as follows: count I, vehicular burglary (Pen. Code, § 459); count II, robbery (Pen. Code, § 211); count III, kidnapping (Pen. Code, § 207); and count IV, murder under special circumstances. Allegations contended respondent murdered Eleanor Buchanan during the commission of a robbery, kidnapping and/or burglary (Cal. Pen. Code, § 190.2). (CT 45-46.)[1/]

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1. "CT" refers to the clerk's transcript and "RT" refers to the reporter's transcript of the trial.

The information further alleged two prior felony convictions (a 1972 forgery and a 1973 burglary). (CT 45-46.) Respondent was arraigned on July 16, 1979, and apparently denied all charges, allegations and prior convictions. (CT 87.)

Jury trial began on November 3, 1980. (CT 1457.) On January 5, 1981, the jury convicted respondent of burglary, robbery, kidnapping, and first degree murder, and found all special circumstances true. (CT 1204-1210.) Thereafter, the penalty phase was held with the jury fixing the punishment at death. (CT 1335.)

Upon automatic appeal to the California Supreme Court, the judgment of

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guilt was affirmed, but the special circumstances and death penalty judgments were reversed. (People v. Hamilton, supra, 41 Cal.3d 408, Appendix A.)

STATEMENT OF FACTS

On the evening of May 30, 1979, 24-year-old Eleanor Buchanan (the victim) had dinner with her husband and two infant sons, then left for school in their new van. They had purchased the van about six weeks earlier and the husband, a dental supply salesman, used it in his work during the day, carrying literature and samples. He told his wife there was very little gas in the van and not to add any because he was taking it

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to the dealer the next morning to replace the tank due to a leak.[2/] (RT 2079, 2077, 2099-2101, 2151.)

Mrs. Buchanan had given birth three weeks earlier and was nursing her baby. She cut chunks of diaper, put them over her nipples to keep milk from leaking on her clothes and left for school at 6:30 p.m. She was wearing tan Levi's, a striped beige and brown T-shirt, white knee socks, bra, panties and a simulated leather purse. (RT 2079, 2077, 2099-2101, 2151.)

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2. All locks and windows worked and nothing was broken on the van when Buchanan turned it over to his wife. When respondent was arrested in it on June 8th, the arm rest of the driver's chair, the metal rod on the ceiling that holds the curtain suspended behind the driver and the wind wing on the passenger's side were all broken. (RT 2086, 2106-2107, 2573, 2577.)

Buchanan habitually locked the van which had valuables in it including dental equipment from her husband's work. (RT 2146, 2150-2151, 2156, 2106, 2083.)

On May 30, 1979, she left her math class early after obtaining xeroxed class notes from fellow students because an optional quiz was offered and she had been absent for the birth of her three-week-old son. Students saw her walking towards the parking lot about 9:30 p.m. (RT 2160, 2162, 2171-2173, 2181-2183.)

At about 1:52 a.m. on May 31, 1979, respondent called Donna Hatch in Terrell, Texas to say he had gotten a van and was leaving for Texas when he could get gas. (RT 2363-2364, 2444-2445.)

There was a gasoline shortage during this time and fuel was sold for limited hours. Between 4:30 a.m. and 10:15 a.m. on May 31, 1979, respondent

purchased gas for the Buchanans' van on their Visa card at Roy's Service Station off Highway 8 in El Cajon, California. He signed the invoice, "Terry Buchanan". (RT 2206-2207, 2210-2211.)

About noon on the same day, Eleanor Buchanan's headless, handless body was found in the grass near a cul-de-sac off Pine Valley Road near San Diego. The cul-de-sac was 200 yards off Interstate 8. The body was in full rigor mortis with the elbow in an upright position, completely off the ground, when a deputy sheriff arrived at the scene between 1:30 and 2:00 p.m. Two strings of twine were attached around Buchanan's ankles and there were dark blue pieces of lint sticking to her blood. The body was clothed in a bra, underpants and socks. The head and hands were never found. (RT 2278-2279, 2289-2290.)

During the autopsy, it was determined that a horizontal stab wound in the abdomen was inflicted before death. Three superficial wounds measuring up to five inches on the abdomen were inflicted after death. The pathologist could not determine cause of death because of the absence of the head, but ruled out natural causes. He could not say whether the hands were cut off while Eleanor Buchanan was alive, but suspected she was dead because there was not much hemorrhaging. He could not say whether she was alive when the head was cut and sawed off. (RT 2337, 2333.) Judging from the rigor mortis, death occurred about 16 hours before the autopsy, about midnight on May 30, 1979. (RT 2340-2341.)

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Meanwhile, respondent continued to drive down Interstate 8 from San Diego to Texas. (RT 2216, 2223, 2258-2259, 2264-2265.) He arrived at Donna Hatch's home in Terrell, Texas, on the evening of June 1, 1979. He was alone. The van was dirty, had a broken arm on the driver's chair, a broken mirror and a broken wind wing. (RT 2364-2368.)

Respondent was on bail pending trial on a robbery charge. (See RT 3563.) He took Donna with him to get addresses for his defense in that case. She saw the Buchanan's credit cards in the van and respondent used them for food and gas. (RT 2369-2373, 2376.)

On June 3, 1979, Donna was in the van with respondent and her daughter and saw a highway patrolman. When Donna suddenly turned, while talking to her little girl, respondent told her not to

make sudden moves because they could get shot. She asked why, but he gave no direct answer. Respondent stopped at a pay phone to call his brother and his friend, Clifton. (RT 2376-2379.)

Donna heard respondent tell his brother he had flown to Texas. (RT 2380.)

Cliff Harris and respondent knew each other all their lives and were good friends. (RT 2489.) Respondent told Harris he drove to Texas in a blue El Dorado. Harris was watching TV as they spoke and saw a report that the headless body had been found. He told respondent. (RT 2490-2492; 3594, 3596.)

Respondent had changed when he returned to the van after talking to Clifton Harris. (RT 2380.) Donna asked what was wrong. Respondent said he thought he killed a man. When they

returned to her home, respondent said he would let the van sit a while to see if anyone paid attention to it and that he needed Texas license plates. He asked her to go to a car lot with him to get the plates, but she refused. (RT 2380-2381.)

The next day, Donna broke up with respondent. Respondent said if she had changed her mind because he had lied about his wife being dead, he would kill the ex-wife. (RT 2382.)

Respondent called Donna on Wednesday, June 6, 1979, to discuss bringing her back to California to testify in his robbery case. (RT 2470-2471.) At one point, a friend of Donna's also got on the phone. Respondent said, "I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have

to be driving this van, I can be in another vehicle." (RT 2474.) Donna never saw respondent after that phone call. (RT 2471-2472, 2382-2384, 2475.)

Respondent continued to use the Buchanans' credit card. It was stipulated he charged a saw, screwdriver and set of wrenches at Babcock Auto Supply in Terrell, Texas, on June 6, 1979, (2518-2519), and a butcher knife and two hanks of twine at Moses five and ten cent store on June 7, 1979. (RT 2519-2520.)

At about 8:30 a.m. on June 8, 1979, respondent entered Stuckey's restaurant in Marietta, Oklahoma. He charged food on Buchanan's Visa, picked up part of his food order and ran out as the manager was calling for authorization on the purchase. The manager called law

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enforcement authorities describing respondent and the van. (RT 2746-2747, 2755-2757.)

That afternoon, respondent was stopped by Oklahoma officers and they ran a VIN number check. They learned the van belonged to a homocide victim. The officers arrested respondent on the local charges. (RT 2598-2599.)

On the way to jail, respondent passed a poster offering a $500.00 reward for David L. Wall, alias "Spider". (RT 2578, 2581.)

On June 9, 1979, San Diego police officers questioned respondent in Oklahoma after reading him his Miranda rights. Respondent said he got the van from Fran, a white woman who had left her

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husband for "Spider", and that he knew "Spider" for six years.[3] Fran and Spider were in Shreveport. They gave him the van and her charge cards to use for food and gasoline. (RT 2846-2848, 2854, 2862.)

Respondent said he saw no blood in the van and the blood on his shoe was his own. (RT 2945-2946, 2904.) A criminalist testifying at trial said the blood on respondent's shoe was type O like Eleanor Buchanan's. (RT 2127.) Respondent was type A. (RT 3112, 3110, 3114.) He later testified the blood

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3. Neither respondent's parents (RT 2048, 2078), nor friends (RT 2489-2734) ever heard of "Spider". "Fran" was Eleanor Buchanan's nickname. It was written on the school papers she was carrying on the night she disappeared and also in an unmailed birth announcement she had in her purse. (RT 2116-2117.)

could not have come from the van's carpeting, but went on wet. It had no blue fibers in it. (RT 2127, 4017-4018.)

The police showed respondent a photograph of Eleanor Buchanan during questioning and asked if that were Fran. He said it looked like her but Fran was a little skinnier. Asked what Fran was wearing when she and Spider picked him up to leave San Diego, respondent said the only time he saw her, she wore light jeans and a beige non-leather purse. (RT 2873-2875.)

En route to San Diego respondent was disturbed about the arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a runaway wife. (RT 2950.) Shortly after respondent's return to San Diego, Terry

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Buchanan received a letter with respondent's return address in county jail. It said, "You are probably full of grief when you should be highly pissed-off . . ." because Fran was not dead but had left with Spider and was smoking Sherman sticks. Buchanan turned the letter over to the District Attorney's Office. (RT 2140-2145.)

Respondent hinted to a local girlfriend in letters and during a jail visit that she should call Terry Buchanan and the press, posing as Eleanor Buchanan and telling them she was alive. (RT 3618-3621.)

On January 24, 1980, respondent was talking about his case to another prisoner. The prisoner said, "Who are you trying to convince, Hamilton, me or yourself?" Hamilton replied, "Well, I

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did it, but they'll never prove it." (RT 3023, 3030.) The prisoner reported the conversation to a guard. (RT 3032.)

While transporting respondent between the jail and courtroom for trial, a deputy sheriff was tightening respondent's security chains. Respondent said, "You go ahead and have your fun, I'll have mine later." The guard responded, "I thought you already had your fun?" Respondent replied, "Yeah, and I'll kill you and a lot more, too, and you may be first on my list." (RT 3327-3329.)

DEFENSE

Respondent testified that he saw the Buchanan's van parked on the street with Eleanor's purse on the passenger seat just after midnight on May 31, 1979, and took it. (RT 3608, 3439.) He never saw the victim dead or alive. (RT 3438.)

HOW THE FEDERAL QUESTION IS PRESENTED

Three years after respondent's trial, Carlos v. Superior Court (1983) 35 Cal.3d 131 misinterpreted Enmund v. Florida (1982) 458 U.S. 782 and held intent to kill was an element and prerequisite to a finding of a felony-murder special circumstance under California's 1978 death penalty initiative.

The California Penal Code enumerates special circumstances for certain serious felonies that so aggravate murders occurring during those felonies that the appropriate punishment is death or life imprisonment without possibility of parole.

Relying on Connecticut v. Johnson (1983) 460 U.S. 73, the California Supreme Court then ruled the failure to instruct a jury on intent to kill with regard to a felony-murder special circumstance (Carlos error)

required reversal in all but a few limited circumstances because it eliminated an "element" of the crime from jury consideration. (People v. Garcia (1984) 36 Cal.3d 53 certiorari denied (1985) 105 S.Ct. 1229; People v. Hamilton (1985) 41 Cal.3d 408, 433, concurring opinion.)

At the guilt phase of this trial, the jury was instructed on felony murder without an instruction on intent to kill. The jury found the felony-murder special circumstances to be true. In light of People v. Garcia, supra, the special circumstances and death penalty were reversed by the California Supreme Court for Carlos error using a standard of prejudice based on Connecticut v. Johnson. (People v. Hamilton, supra, 41 Cal.3d at pp. 431-432.)

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The People urged rehearing on the basis that (1) intent to kill is manifest from the facts combined with defendant's failure to introduce any evidence of accidental killing, (2) the Garcia test is too demanding, and (3) reversal should be limited to cases that presented some evidence of lack of intent or affirmed with opportunity to present such evidence. The petition for rehearing was denied with two justices dissenting.

Thereafter, this Court decided Cabana v. Bullock (1986) 474 U.S. ___ [88 L.Ed.2d 704] which suggested an erroneous finding on a special circumstance was not the type of error covered by Connecticut v. Johnson, supra, 460 U.S. 73.

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REASON FOR GRANTING THE WRIT

Certiorari should be granted as the California Supreme Court's decision conflicts in principle with Cabana v. Bullock, supra, and is based on a misinterpretation of Connecticut v. Johnson, supra, 460 U.S. 73 and other decisions of this Court.

The California Supreme Court held intent to kill is an element of special circumstances that must be found by the jury under federal law (Carlos v. Superior Court, supra, 35 Cal.3d 131.) and failure to instruct the jury on intent to kill removed an "element" from its consideration so as to require reversal under Connecticut v. Johnson. (People v. Garcia, supra, 36 Cal.3d at p. 539; People v. Hamilton, supra, 41 Cal.3d at pp. 431-432.)

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However, Cabana expressly declared Enmund "establishes no new elements of the crime of murder that must be found by the jury" (Cabana v. Bullock, supra, 88 L.Ed 2d at p. 715) and indicates the decision of whether to impose the death penalty (i.e., a finding of a special circumstance) is not a finding of guilt or innocence of the kind discussed in Connecticut v. Johnson, supra. (Id., at p. 716.) This holding implies that special circumstance findings are not covered by Connecticut v. Johnson and the decisions in Garcia and Hamilton thus do not comport with federal law.

Therefore, certiorari should be granted because the opinion of the California Supreme Court on this issue misreads the application of Connecticut v. Johnson to special circumstance findings.

ARGUMENT

PURSUANT TO CABANA V. BULLOCK, CONNECTICUT V. JOHNSON DOES NOT CONTROL THE STANDARD OF PREJUDICE FOR A TRIAL COURT'S FAILURE TO INSTRUCT ON THE INTENT-TO-KILL ELEMENT OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE

Petitioner, the State of California, request certiorari be granted by this Court to consider the important question of whether the standard of prejudice espoused in Connecticut v. Johnson (1983) 460 U.S. 73 can be applied to a situation where the jury is not instructed on the issue of intent to kill with regard to a felony-murder special circumstance.

The California Supreme Court declared intent to kill an "element" of special-circumstance felony murders. (Carlos v. Superior Court (1983) 35 Cal.3d 131.) When it considered the standard of prejudice applicable to the

trial court's failure to instruct on intent to kill, the California Supreme Court declared an element of special circumstance felony-murder had been eliminated from jury consideration bringing the error under the rule espoused in Connecticut v. Johnson, supra. (People v. Garcia (1984) 36 Cal.3d 53, certiorari denied (1985) 105 S.Ct 1229.) Under Connecticut v. Johnson, a jury instruction which takes an issue involving an element of the crime completely away from the jury can never be treated as harmless error. (Connecticut v. Johnson, supra, 74 L.Ed.2d at p. 835.) Therefore, Garcia declared Carlos error reversible in all but a few situations.

The California Supreme Court in this case concluded the failure to instruct on intent to kill was prejudicial in accord with Garcia

and Connecticut v. Johnson, and reversed the special circumstances. (People v. Hamilton, supra, 41 Cal.3d at pp. 431-432.) However, Cabana v. Bullock, supra, 88 L.Ed 2d 704 indicates the California Supreme Court's reliance on Connecticut v. Johnson in Garcia and this case was misplaced.

Cabana holds that the Constitution is not violated by the execution of a person who in fact killed, attempted to kill, or intended to kill, regardless of who makes the determination of the requisite culpability. (Id., at p. 716.) The determination may be made by the trial judge, an appellate court,

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or a federal court on habeas corpus, as well as the jury. (Id., at p. 750.)[4/]

Cabana v. Bullock, supra, 88 L.Ed 2d 704 also expressly stated Enmund "establishes no new elements of the crime of murder that must be found by the jury" (Id., at p. 715) and held what punishment is appropriate in any given case is not a decision that must be made by a jury even if the death penalty is chosen. (Id., at p. 716.)

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4. In the case at bar, the trial judge found " . . . when the victim returned to the vehicle from an evening class she was attending at Mesa College on May 31, 1979 [.] the defendant violently overpowered the victim, hogtied her, inflicted a stab would to her stomach while she was still alive; murdered her, and then to avoid identification of the victim and ultimately identification of the defendant through the victim's vehicle, he further desecrated her body by severing her head and her hands." (RT 4737.)

Of greater import, however, Cabana clearly indicates a finding on a special circumstance involves a determination of whether death is the appropriate punishment and that such a finding is not a finding of guilt or innocence of the type discussed in Connecticut v. Johnson, supra. (Cabana v. Bullock, supra, 88 L.Ed.2d at p. 715.)

Footnote 4 of Cabana does not compel a contrary result. It discusses Hicks v. Oklahoma (1980) 447 U.S. 343 which held that where state law creates for the defendant a liberty interest in having the jury make particular findings, the due process clause implies that appellate findings do not suffice to protect that entitlement. (Cabana v. Bullock, supra, at p. 717, fn. 4.)

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Carlos v. Superior Court, supra, discussed a state statute, but was based primarily on a misreading of Enmund v. Florida, supra. Carlos concluded Enmund required an intent to kill for the actual killer as well as the aider and abettor. However, as Cabana makes clear, the actual killer need not have the intent to kill. (See Cabana v. Bullock, supra, 88 L.Ed.2d at p. 715.)

Since Carlos was based on a misreading of federal constitutional law, it was not based on any state liberty interest. Thus, footnote 4 did not preclude application of any language in Cabana to this case.

Cabana makes it clear that the standard of prejudice espoused in Connecticut v. Johnson has no applicability at all to any defect relating to the special circumstance finding. Thus, to

the extent Garcia applies Connecticut v. Johnson, supra, in such a situation, it misreads federal constitutional law as set forth by this Court in Cabana v. Bullock, supra.

Certiorari should be granted. Indeed, the federal question can scarcely be avoided since the concurring opinion below admits Garcia is based squarely on federal constitutional law as set forth in Connecticut v. Johnson, supra. (People v. Hamilton, supra, 41 Cal.3d at pp. 433-436; Grodin, concurring.)

Considered in context, Cabana's holding and its discussion of a reviewing court's authority to correct instructional error arising from the sentencing phase of trial leads to the conclusion that Connecticut v. Johnson does not provide the appropriate test of prejudice when a jury has not been properly instructed on

the intent element of a felony-murder special circumstance. (See People v. Payne (1986) 177 Cal.App.3d 1189, 1194-1195.)

Since Cabana now indicates Connecticut v. Johnson would not apply to a situation such as that presented here, Garcia and the decision of the California Supreme Court in this case are no longer viable.

The next question, of course, is what standard does apply. Not all federal constitutional errors are prejudicial. In the context of a particular case, some errors have little or no likelihood of affecting the jury's finding. Thus, Chapman v. California (1967) 386 U.S. 18 establishes two classes of constitutfonal errors. Those errors that are so basic to a fair trial that their infraction can never be treated as

harmless and those, less fundamental errors, that may be considered harmless if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (Chapman v. California, supra, 386 U.S. at p. 24.)

This Court recently reaffirmed these harmless error principles in Delaware v. Van Arsdell (1986) ___ U.S. ____ 46 CCH S.Ct. Bull. p. 1681. Stating certain constitutional errors such as denying assistance of counsel at trial or compelling a defendant to stand trial before a trier of fact with a financial stake in the outcome are so fundamental and pervasive as to require automatic reversal (Id., at p. 1681), others (erroneous limitation to cross-examination admission of identification obtained in violation of

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right of counsel or nontestifying co-defendants' statement) are subject to the harmless error standard of Chapman. (Delaware v. Van Arsdell, supra, 46 CCH S.Ct. Bull. at pp. 1689, 1692.)

In the present case, we are not dealing with the elements of an offense. After guilt was established, special circumstances were found which are a sentencing consideration to determine whether the defendant's crime comes within a category which makes him liable for the punishment of death or life imprisonment without possibility of parole. The determination of special circumstances would seem less fundamental than the classic determination of whether a criminal offense has occurred. Thus, it is reasonable to treat any error in instructions concerning the elements of a special circumstance under the harmless

error test of Chapman as suggested by Cabana v. Bullock, supra.

In any event, since Cabana v. Bullock has now made it unmistakably clear that the finding of a lack of intent to kill is not a guilt or innocence determination and that the California Supreme Court has thus erroneously applied the Connecticut v. Johnson prejudice test to a defect in such a determination in People v. Garcia, supra, and in this case, it is respectfully requested certiorari be granted.5/

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5. Indeed, the concurring opinion below suggests that Garcia may have been wrongly decided, speculating this Court may grant certiorari "in this or another case and tell us we were wrong in Garcia. . . ." (People v. Hamilton, supra, 41 Cal.3d at p. 436.

CONCLUSION

For the foregoing reasons, the People respectfully submit the writ of certiorari should be issued to review this decision of the California Supreme Court.

Respectfully submitted,

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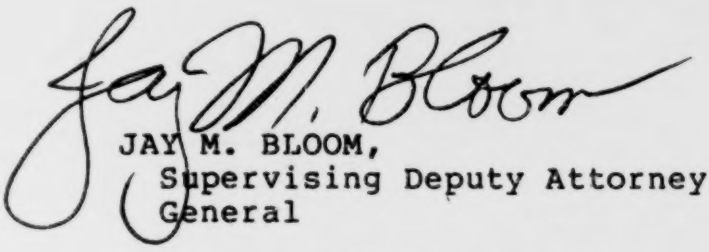

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PEOPLE OF THE STATE OF CALIFORNIA

Petitioner

v.

BERNARD LEE HAMILTON

Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Barry L. Morris
Attorney at Law
580 Grand Avenue
Oakland, CA 94610

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Thomas McArdle
Deputy District Attorney
County of San Diego
P.O. Box X-1011
San Diego, CA 92112

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 6 day of May, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 6, 1986

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 6th day of May, 1986.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986